



# INDIANA DEPARTMENT OF ENVIRONMENTAL MANAGEMENT

## Concentrated Animal Feeding Operations

### EMERGENCY RULE

[www.idem.IN.gov](http://www.idem.IN.gov)

Mitchell E. Daniels, Jr.

Governor

Thomas W. Easterly

Commissioner

100 North Senate Avenue, Mail Code 65-45, Indianapolis, IN 46204

Phone: (317) 233-1655

Toll Free: (800) 451-6027

### Description

This emergency rule amends rules at 327 IAC 5-4-3 concerning Concentrated Animal Feeding Operations (CAFO), as well as 327 IAC 15-15-1, 327 IAC 15-15-2, 327 IAC 15-15-9, 327 IAC 15-15-11, and 327 IAC 15-15-12 concerning the NPDES general permit rule program. These amendments are made in order to be consistent with federal rules and the recent decision of the 5<sup>th</sup> Circuit Court of Appeals in *National Pork Producers Council et al. v. U.S. EPA*.

### Citations Affected

327 IAC 5-4-3; 327 IAC 15-15-1; 327 IAC 15-15-2; 327 IAC 15-15-9; 327 IAC 15-15-11; and 327 IAC 15-15-12

### Affected Persons

The public and approximately one hundred thirty farms (130) in Indiana.

### Reason(s) for the Rule

This emergency rule makes Indiana's CAFO program and NPDES permit program consistent with the current federal rules.

### Economic Impact of the Rule

There are currently approximately one hundred thirty (130) farms in the state of Indiana which the current rule would require to seek a permit. These proposed amendments would relieve them of this requirement. Since coverage is granted for five years and the application fee is one hundred fifty dollars (\$150), the approximate annual cost savings to the regulated community for this rulemaking is three thousand nine hundred dollars (\$3,900).

### Benefits of the Rule

This emergency rule makes Indiana's CAFO program and NPDES permit program consistent with the current federal rules.

### Description of the Rulemaking Project

The EPA began regulating discharges of wastewater and manure from CAFOs in the 1970s. The EPA initially issued national effluent limitations guidelines and standards for feedlots on February 14, 1974 (39 FR 5704), and NPDES CAFO regulations on March 18, 1976 (41 FR 11458). In February 2003, EPA issued revisions to these regulations that focused on the 5% of the nation's animal feeding operations (AFOs) that presented the highest risk of impairing water quality and public health (68 FR 7176–7274; February 12, 2003) ("the 2003 CAFO rule"). The 2003 CAFO rule required the owners or operators of all CAFOs to seek coverage under an NPDES permit, unless they demonstrated no potential to discharge.

A number of CAFO industry and several environmental groups filed petitions for judicial review of certain aspects of the 2003 CAFO rule. This case was brought before the U.S. Court of Appeals for the Second Circuit. On February 28, 2005, the court ruled on these petitions and upheld most provisions of the 2003 rule but vacated and remanded others. *Waterkeeper Alliance, et al. v. EPA*, 399 F.3d 486 (2d Cir. 2005).

The CAFO industry organizations argued that EPA exceeded its statutory authority by requiring all CAFOs to either apply for NPDES permits or demonstrate that they have no potential to discharge. The court agreed with the CAFO industry petitioners on this issue and therefore vacated the "duty to apply" provision of the 2003 CAFO rule. This emergency rule specifically deals with the Courts ruling to vacate



the “duty to apply” provision of the 2003 CAFO rule. IDEM proposes to change rule language in order to comply with the court’s verdict.

In *National Pork Producers Council et al. v. U.S. EPA* (Case No. 08-61093, decision filed March 15, 2011), the Fifth Circuit Court of Appeals overturned the requirement for CAFOs that “propose to discharge” to obtain NPDES permit coverage. This emergency rule is consistent with that decision.

### **Scheduled Hearing**

There are no hearings scheduled for this emergency rule.

### **Consideration of Factors Outlined in Indiana Code 13-14-8-4**

Indiana Code 13-14-8-4 requires that in adopting rules and establishing standards, the board shall take into account the following:

- 1) All existing physical conditions and the character of the area affected.
- 2) Past, present, and probable future uses of the area, including the character of the uses of surrounding areas.
- 3) Zoning classifications.
- 4) The nature of the existing air quality or existing water quality, as appropriate.
- 5) Technical feasibility, including the quality conditions that could reasonably be achieved through coordinated control of all factors affecting the quality.
- 6) Economic reasonableness of measuring or reducing any particular type of pollution.
- 7) The right of all persons to an environment sufficiently uncontaminated as not to be injurious to:
  - (A) human, plant animal, or aquatic life; or
  - (B) the reasonable enjoyment of life and property.

### **Consistency with Federal Requirements**

This rule is consistent with the current federal regulations for concentrated animal feeding operations in 40 CFR 122, except as noted above.

### **Emergency Rulemaking Process**

Emergency rules under IC 4-22-2-37.1 take effect on the latest of the following dates:

- 1) The effective date of the statute delegating authority to the agency to adopt the rule.
- 2) The date and time that the rule is accepted filing by the Publisher.
- 3) The effective date stated by the adopting agency in the rule.
- 4) The date of compliance with every requirement established by law as a prerequisite to the adoption or effectiveness of the rule.

An emergency rule expires not later than ninety (90) days after the rule is accepted for filing by the Publisher. An emergency rule may be extended for two (2) extension periods.

### **Additional Information**

Additional information regarding technical aspects of this rulemaking action can be obtained from Mike Dunn, Permits Branch, Office of Land Quality, (317) 232-8736 or (800) 451-6027 (in Indiana).

Additional information regarding procedural aspects of this rulemaking action can be obtained from Steve Mojonner, Rules Development Branch, Office of Legal Counsel, (317) 233-1655 or (800) 451-6027 (in Indiana).